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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1122

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST - - - - - - Respondents

AND

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

JOHN E. HAYCRAFT and HAZEL K. LANE - - - - - - Respondents

(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Additional Respondents in Board of Education v. Newburg Area Council, Inc.:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmid, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County, Kentucky and Board of Education of Louisville, Kentucky v. John E. Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmid, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, and Kentucky Human Relations Commission.

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(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Jefferson County Board of Education and its Superintendent, respectfully pray that a writ of certiorari issue to review the decision rendered in this case on December 11, 1974, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Memorandum Opinion and Judgment of the District Court in Civil Action No. 7291-G, *Haycraft, et al.* v. *Board of Education of Louisville* and *Jefferson County,* entered the 8th day of March, 1973, appears in the separate Appendix, at pages 4-37 and has not been officially reported.

The Memorandum Opinion and Judgment of the District Court in Civil Action 7045, *Newburg Area Council, Inc., et al.* v. *Board of Education of Jefferson County, et al.,* entered the 8th day of March, 1973, appears in the separate Appendix at pages 38-70 and has not been officially reported.

The Opinion of the Sixth Circuit Court of Appeals, decided and filed December 28, 1973, is reported as *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, and appears at pages 72-83 of the separate Appendix.

The Judgment of the United States Court of Appeals for the Sixth Circuit in Civil Actions Nos. 73-1403, and 73-1408, reflecting the opinion in the above case were entered February 11, 1974, and appears in the separate Appendix on pages 84-87.

The Opinion of the United States Circuit Court of Appeals in the consolidated actions Nos. 73-1403 and 73-1408, following this Court's decision in *Milliken* v. *Bradley,* 94 S. Ct. 3112 (1974) was rendered on December 11, 1974, and has not been officially reported. It appears in the separate Appendix at pages 87 to 95.

The original order of the District Court declining to cross political boundaries and dismissing the Anchorage School Board, entered October 18, 1973, appears in the separate Appendix at pages 1-3.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 1974. This petition for writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1241(1) (App. 96).

STATEMENT OF QUESTIONS PRESENTED

I. Does Court of Appeals' Decision, Reversing District Court's Findings, that Contiguous School Districts Retain Vestiges of State-Imposed Segregation, Impose a Requirement of Metropolitan "Racial Balance" In Conflict with the Principles Laid Down by the Decisions of the Supreme Court?

II. Does Court of Appeals' Decision, Reversing District Court Decision That Contiguous School Districts Are Unitary and That the School Boards Effectively Eliminated Desegregation After *Brown* I, Conflict with Decisions of Supreme Court that School Authorities Are Not Constitutionally Required to Make Year-By-Year Adjustments of the Racial Composition of Student Bodies Where, Following 1965, Regrettable Imbalance Proliferated Because of Socio-Economic Factors, and not De Jure Acts or Failure to Act and Despite Resistance by the School Authorities?

CONSTITUTIONAL PROVISION AND KENTUCKY STATUTES INVOLVED

The Constitutional provision and the Kentucky statutes relevant to the issues in this case are: U.S. Constitution Amendment XIV, §1; Kentucky Revised Statutes, Chapter 160, relating to school districts. These are set forth in the separate Appendix at pages 94-96.

STATEMENT OF THE CASE

Two class actions concerning desegregation of contiguous school districts, the Louisville Independent School District and the Jefferson County School District in Jefferson County, Kentucky, against the boards of education of the respective districts and their superintendents contended, inter alia, that vestiges of state-imposed segregation existed in those school systems which had, prior to 1954, been racially dual systems by virtue of state law. Intervening third parties also named as additional party defendant a third small independent school district in the county and contended that all three School districts were in constitutional violation which could only be corrected by merger of the school districts. The United States District Court for the Western District of Kentucky conducted separate trials, rendered separate opinions and dismissed both actions, holding that each of the two major school districts involved operated a unitary school system in accordance with the Constitution.

On December 28, 1973, the Sixth Circuit Court of Appeals determined that the Jefferson County school system had not been fully converted to a unitary system where 56% of all its black elementary students attended three of 74 elementary schools and these three schools were surrounded by several all-white or virtually all-white schools, and further determined that with reference to the Louisville Independent School District, that 80% of its schools were racially identifiable", 20 years after the decision in *Brown* I, and that such a system was not a unitary system. The Court concluded that all vestiges of state-enforced discrimination must be eliminated by the District Judge within each district and to accomplish such purpose, state-created school district lines should impose no barrier. The Court of Appeals remanded the action to the District Court for proceedings to formulate a desegregation plan for all school districts in Jefferson County, Kentucky, directing the District Court to include the previously dismissed small Anchorage Independent School District, and required the plan of desegregation to be made effective for the 1974-75 academic year. Thereupon, the District Court entered appropriate orders in accord with the Court of Appeals' mandate. The two larger school systems in Jefferson County filed a desegregation plan. The District Court conducted hearings and entered a judgment on July 23, 1974, merging all three school systems and directing cross-district transportation of more than 30,000 additional children and provided for the implementation of such plan by September, 1974.

Two days later on July 25, 1974, the Supreme Court of the United States granted petitions of certiorari filed by all three school districts in Jefferson County, Kentucky, while concurrently rendering its full opinion in the Detroit case of *Milliken* v. *Bradley, supra.* This Court's order in the three Jefferson County cases vacated the Court of Appeals' judgments and remanded the cases for further consideration in the light of *Milliken* v. *Bradley* (App. 105). Immediately following this Court's order granting certiorari, the District Court, *sua sponte,* vacated its judgment of July 23, 1974, pending further instructions from the United States Court of Appeals.

On August 8, 1974, the Court of Appeals directed the parties to file supplemental briefs addressed to all questions applicable to the reconsideration of its prior opinion of December 28, 1973. Oral arguments were heard on October 14, 1974, and on December 11, 1974, the United States Court of Appeals for the Sixth Circuit rendered its opinion and judgment in which it determined that the Supreme Court's opinion in *Milliken* v. *Bradley, supra,* of July 25, 1974, and its order of remand in no way required a reconsideration of the Court of Appeals' prior opinion insofar as it held that *both* the Louisville and the Jefferson County school districts were operating dual school systems from which all vestiges of state-imposed segregation had not been eliminated as required by law.

The Court of Appeals thereupon addressed its opinion *only* to its prior holding that the District Court, in approving or formulating a plan of desegregation for

Jefferson County, Kentucky would have the power to require that state-created school district lines could be disregarded. The Court of Appeals concluded that there were material and controlling distinctions between the facts of the Jefferson County case and the facts before the Supreme Court in the *Milliken* case, and therefore reinstated its opinion of December 28, 1973, modified in three respects.

First, the Court of Appeals ordered the District Court to join the small independent Anchorage school district as party defendant *only* if it deemed it necessary to provide an adequate remedy. Secondly, effectiveness of the order of the District Court providing an inter-district remedy was directed to be postponed until all appeals in connection with any such order had been exhausted or in the event no appeals were taken, until the time for such appeal had expired. Third, the Court of Appeals directed that in no event should the District Court order a metropolitan desegregation plan to take effect before the beginning of the academic year beginning in September, 1975.

Immediately upon rendition of the Court of Appeals' opinion, respondents, moved the District Court to reinstate its judgment of July 23, 1974, merging all three school districts and ordering the implementation of a desegregation plan which provided for the transportation of an additional 30,000 students without reference to district lines. On January 30, 1975, the District Court entered an order refusing to reinstate its July, 1974 judgment, taking note of the 1974 Congressional "Amendments to the Education Acts of 1974"

(20 U.S.C.A. 1714(a), *et seq.*), and also noting the fact that a merger of the two larger school districts was contemplated under state procedures. Jefferson County Board of Education was directed to submit by April 30, 1975, a desegregation plan that would eliminate all vestiges of state-imposed segregation throughout Jefferson County and to incorporate the provisions of the Court's previous judgment of 1974 relative to implementation of that plan. The District Court's order makes provision for all other parties to file objections to the new plan and for such alternative plans as any party desired to submit; and it provides for the conduct of *evidentiary hearings* for the final development of a desegregation plan and such other proceedings, including a consideration of the small independent district of Anchorage, as is necessary to enable the Court to comply with the opinion of the Circuit Court of Appeals of December, 1974. It is anticipated that such hearings will be conducted in July 1975.

On February 28, 1975, the Board of Education of the Commonwealth of Kentucky, acting pursuant to the powers conferred upon it by Kentucky statute (App. 95, KRS 160.041), ordered a merger of the Louisville Independent School District and the Jefferson County School District as of July 1, 1975.

Since the action of the Kentucky State Board of Education merging the Jefferson County district and the Louisville Independent School District effective July 1, 1975, renders the legal question of crossing school district lines between those two districts moot and leaves that question open only as to the right of

the District Court to involve the independent district of Anchorage, this petition of certiorari is solely for the purpose of reviewing the decision of the United States Court of Appeals for the Sixth Circuit of December 11, 1974, incorporating the opinion of the Court of Appeals of December 28, 1973, which determines that neither the Louisville Independent School District nor the Jefferson County school district is a unitary system but that both are presently operating dual school systems from which all vestiges of state-imposed segregation have not been eliminated.

The Court of Appeals in its December, 1974 opinion clearly states that it construes the Supreme Court's opinion in *Milliken* v. *Bradley* (and the Supreme Court's order remanding these cases) as in no way requiring a reconsideration of its previous holding of December, 1973 that both the Louisville and the Jefferson County school districts are operating dual school systems. The District Court made findings of fact and conclusions of law determining that *both* Jefferson County and the Louisville Independent School District had eliminated all vestiges of state-imposed segregation and are operating unitary districts. The Court of Appeals in its December, 1973 opinion and in its December, 1974 opinion rejected the conclusions reached by the District Court and found both districts to be dual systems in violation of constitutional requirements. A brief summary of the findings and conclusions of the District Court and of the Court of Appeals' decision follows:

The respondents, plaintiffs in the District Court, in their charges against the two school districts, from the outset made it clear that they were *not contending* that the two school systems were unconstitutionally maintained because of *poor quality or substandard education.* The District Judge was advised in the opening statements in both cases by counsel for the respondents:

> "We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The only problem is that the schools are racially identifiable." (Separate Appendix, page 103).

Admitting that both boards undertook, following the decision in the *Brown* I, to desegregate the school systems, plaintiffs contended that the efforts of the boards had not been sufficient and all vestiges of state-imposed segregation had not been eliminated because of the existence in both systems of *racially identifiable schools.* The evidence offered by the respondents in both trials was confined almost entirely *to statistical and demographic information* relating to the two school systems. With reference to the Jefferson County school district the thrust of the complaint was that the board had created and redrawn attendance zones in such a way as to increase, rather than reduce, the degree of racial segregation and in particular it complained that the board had rebuilt Cane Run Elementary School in such a manner as to increase segregation. It was asserted that the board continued to maintain Newburg Elementary School as an all-black school and had con-

structed new schools and redrawn attendance lines in other surrounding areas in such a method as to increase rather than decrease racial segregation.

The evidence reflected that the Jefferson County school system encompassed approximately 280 square miles as compared to the Louisville Independent District which contained approximately 65 square miles; that the Jefferson County Board was operating 103 schools of which 74 were elementary schools, 6 middle schools, and 18 combined junior and senior high schools. The number of pupils in the Jefferson County system was 95,800 of which 92,100 were white and 3,700 were black so that the percentage of black students to white students in the entire system was 4.01%. None of the respondents' evidence criticized the middle schools or the senior high schools operated by the Jefferson County Board and respondents' principal evidence was relegated to the fact that at the present time 56% of the black elementary students in the entire county district attended three schools and that two of the three schools, including one which was virtually all-black, were surrounded by virtually all-white schools. The evidence established that in some of the surrounding white schools overcrowding was experienced, whereas the one all-black school was underutilized.

The evidence introduced by the Jefferson County Board reflected the efforts made since 1954 to abolish pre-*Brown* vestiges of state-imposed segregation, including the location of new schools, the closing of certain all-black schools, the changing of school attendance zones to encourage desegregation and the integration of

faculties and administrators as far as possible. The evidence introduced by the county school board was directed to the proposition that despite its efforts to dismantle the dual system which had existed by state law prior to 1954, the movement of population and the concentration of black population in specific areas of the county due to housing patterns and other factors over which the school board had no control resulted in allegedly racially identifiable schools on a de facto basis.

The District Judge found no support for the argument that the Jefferson County Board was operating a dual system and rejected as unrealistic the contention of the respondents that the school board was required to transport white children into the one all-black Newburg school from adjoining districts and at the same time transport black children who lived near that school to white schools surrounding it, thus cross-busing or "leap-frogging" these children to achieve some sort of racial balance. The District Court found positive evidence of activity by the county district and affirmative action to close schools and take other steps to desegregate the schools and the Court rejected any particular degree of racial balance as being a constitutional requirement and concluded that there was no denial of any child's right to a quality education by reason of his race.

The District Court found, on the contrary, that the decreased use of the all-black Newburg school was the result of the deliberate action of the County Board to desegregate its school system, that the increasing percentage of black children in the neighboring Price

Elementary School and indeed, the location of the school itself was an attempt by the board to relieve the neighboring over-crowded Rangeland area and to achieve an approximate black population ratio of 20-25% when the Price school opened. With reference to the allegations concerning the Cane Run School, the District Judge found that the relocation of that school at its former site was appropriate and that it was in the most practical geographic position possible to serve the population of the area and that the sudden influx of black students in 1971-72 was not an occurrence which could have been reasonably anticipated by the school board and that the departure of nearly 50% of the white students from the district within approximately three school years was a racial imbalance resulting from de facto causes and not de jure acts or any failure to act.

With reference to the Louisville Independent School system, the District Court, in a meticulously careful examination of the situation, concluded that the contention of the respondents, that racial "imbalance" existed in the Louisville school system was not equivalent to "vestiges of a dual school system which must be dismantled," under the decisions of this Court. The School Board conceded that it had the burden to come forward and show to the Court's satisfaction that the imbalance was not due to any invidiously discriminatory actions or failures to act, by the Board or the State, but that the imbalance resulted from factors beyond the authorities' control, despite every reason-

able and practical effort to maintain a unitary school system.

The Court in a detailed opinion traced the spectacular movement of the black population of the City of Louisville from the central area of that city to the western area of the city *as a result of urban renewal.* The Court noted that the federal agencies primarily concerned with enforcing the mandate of the two *Brown* decisions and other decisions had repeatedly concluded, after lengthy and searching examination and studies of the ways in which the Louisville district might achieve greater racial balance in its schools, that it could not be improved upon. From 1965 through 1972, HEW had never disapproved or denied a grant in aid to the Louisville district for the reason that it was not a unitary district, but on the contrary, as late as 1972, it had reiterated its position that the Louisville district was a unitary one.

The District Court noted that the respondents tacitly conceded that any further efforts by the Louisville School Board beyond what it was doing to achieve greater racial balance would result in a systemwide tilt, leaving the district blacker and poorer and more segregated and noted plaintiffs agreement that only by a merger of the three school districts in the county could any greater degree of integration concievably be accomplished. The District Court found no evidence that the board's student assignment plan or its method of establishing school attendance zones had contributed to the racial imbalance that existed in the schools, that the Louisville board had closed twenty-three schools,

that in 13 of these closings, greater integration had resulted, that the Louisville board had accomplished a complete faculty integration, that the majority of the schools that had been closed were black schools, and that the children that had attended those schools were transferred to schools which had been formerly white, thereby establishing even further desegregation. In short, the District Court found that the board's school closing policy was non-discriminatory and not designed to perpetuate a dual school system, but on the contrary, had been designed to achieve maximum desegregation (App. 21).

The Court of Appeals in its second opinion, in December, 1974, made some reference to the construction of Atherton High School in the southeastern part of the city but beyond the boundary of the Louisville Independent School District. The Court of Appeals seemed to feel that this action was taken by the Louisville school board as a deliberate act opposed to desegregation. The fact is well known to every citizen of Louisville and Jefferson County and the District Court found as a matter of fact that the construction of the new Atherton was not undertaken nor designed to perpetuate a dual system or to create a racial imbalance but that indeed after the new Atherton High school was opened, more blacks attended the new facility than had attended the old facility near the heart of the city (App. 25). The District Court found that the Louisville school board had in no way "gerrymandered" the attendance zones and that such attendance zone changes that had been made were affirmatively directed toward

better racial balance and that no invidious discrimination nor de jure acts on the part of the Louisville School Board had contributed to the regrettable "racial imbalance" found in the City of Louisville, following 1965.

The District Court also found that there was not one scintilla of evidence offered during the two trials to the effect that the State Board of Education, the Superintendent of Public Instruction, the General Assembly of the Commonwealth of Kentucky, or any other state agency had done anything whatsoever to perpetuate a dual school system, or that they had done anything to impede the desegregation effort of the two local school districts within the Commonwealth of Kentucky.

Finally, after lengthy and careful consideration of voluminous evidence regarding both school systems, the District Court concluded that they had moved with dispatch and diligence to desegregate the schools and faculties following *Brown* I and *that particularly since 1965, regrettable racial imbalance began which did not germinate from nor proliferate from any acts or failures to act by the school boards or state authorities.* The district court found specifically that the proliferation had been the result (in spite of the efforts of resistance by the school boards) of white flight, neighborhood housing patterns, and socio-economic factors, and not de jure acts or failure to act. Finding that the school officials had been aware of the responsibilities imposed upon them by the advancing state of the law as it was developed by the courts, the District Court concluded that *both school boards* had undertaken to

comply with the letter and the spirit of the law and that there was not a constitutional violation of the rights of the plaintiffs or any other children in the school systems and that both school systems were unitary. Accordingly, the Complaints were dismissed.

The Court of Appeals determined with regard to the Jefferson County school system that all vestiges of state-imposed segregation *had not been eliminated* so long as its Newburg school district remained virtually all-black and so long as 56% of the black elementary school children in the system were required to attend three schools (two of which were surrounded by a number of virtually all-white schools which were overcrowded), while at the same time the Newburg school was not used to capacity. The Court of Appeals concluded that Jefferson County had not been fully converted to a unitary system and that it was required to take affirmative action, not only to eliminate the effect of state-imposed segregation of the past, *but also to avoid future discrimination by insuring that no other school in addition to Newburg would ever become racially identifiable* as a black school. The Court of Appeals found that the Jefferson County school district thus had three elementary schools that "either are or are rapidly becoming 'racially identifiable' ". It declared that Newburg school, a pre-*Brown* black school, was racially identifiable and that the Price and Cane Run schools were rapidly *becoming* racially identifiable as black schools. This condition, it concluded, did not conform to the constitutional standards set by the courts.

The Court of Appeals determined that the Louisville Board of Education was not operating a unitary school system because *its transfer provision was not a permissible method for a school board to employ* in dismantling a dual system and eliminating all vestiges of state-imposed segregation, particularly where that method permitted racially identifiable schools to continue to exist. The Court of Appeals rejected the District Judge's findings and the contention of the Louisville Board that *population shifts* had changed the racial composition of some of the schools and had contributed to the existence of racially identifiable schools. The Court of Appeals concluded that shifts of population which changed the racial composition of many neighborhood schools did not relieve the Louisville system of its duty to convert to a unitary school system.

Concluding that both school boards had not eliminated all vestiges of state-imposed segregation and that the District Judge had erred in his conclusion and determination that the two districts were unitary, the Court of Appeals reversed the Judgment of the District Court and remanded the case for proceedings to formulate a desegregation plan for all three school districts in Jefferson County.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erroneously Equates the Existence of "Racially Identifiable" Schools in Contiguous Districts With Unconstitutionality and Substitutes in Effect a Constitutional Requirement That in Each School in the Metropolitan Area There Must be a Racial Composition Substantially

Consistent With the Areawide Black-White Population in Conflict with Decisions of this Court.

II. The Court of Appeals Erroneously Ignored or Disagreed With the District Court's Finding That School Boards, Following *Brown* I, Eliminated Vestiges of State-Imposed Segregation and That Thereafter Socio-economic Conditions and Housing Patterns Caused Segregation Completely Beyond the Control of School Authorities and Despite Their Efforts. This Action Conflicts With Principles Set Forth in the Opinions of This Court.

The order of the United States Circuit Court of Appeals remanding this case to the district court does not affect the merits of this petition for certiorari. In this same action this Court has previously granted a writ of certiorari, notwithstanding the order of the Court of Appeals remanding the case to the district court. Likewise in *Milliken* v. *Bradley,* the writ of certiorari was granted notwithstanding the remand order in that case contained in the opinion of the Court of Appeals. This Court has previously determined that a writ of certiorari may issue notwithstanding a remand of the case by the Court of Appeals if there is present an important and clear-cut issue of law fundamental to the further conduct of the case. *U. S.* v. *General Motors Corporation,* 323 U. S. 373 (1944); *Gillespie* v. *U. S. Steel Corporation,* 379 U. S. 199 (1964). Furthermore, petitioners are compelled to file this petition for certiorari at this time because of the Court of Appeals' opinion reaffirming and reinstating its previous decision on the fundamental question of

the constitutional violation of the petitioners. The "law of the case" doctrine, while not an absolute one, would prevent a reconsideration of this vital matter upon a subsequent appeal from a judgment entered on the mandate of the Sixth Circuit Court of Appeals. *General American Life Insurance Company* v. *Anderson,* 156 F. 2d 615 (1946)—C. C. A. Ky.; *Hildreth* v. *Union News Company,* 315 F. 2d 548, Cert. denied 84 S. Ct. 69, 375 U. S. 826, 11 L. Ed. 2d 59.

We do not seek to revive here the former controversy concerning the distinction between de jure and de facto segregation, because we realize the validity of the statement of Mr. Justice Powell in *Keyes* v. *School District No. 1,* 413 U. S. 189, 37 L. Ed. 2d 548, 93 S. Ct. 2686, that the decisions of this Court from 1954 to 1971 extended the concept of state neutrality and transformed it into the present constitutional doctrine requiring affirmative state action to desegregate school systems. Both school boards assumed this burden in the district court and recognized that the respondents were not required to prove that the school boards' actions "caused" the current alleged school segregation. Both boards recognized in the trial on the merits, and the District Court found as a matter of law, that the school authorities *had the burden of showing* that the current segregation that does exist in the two districts was in no way the result of past segregative actions. The District Court found that the school boards met this burden, and that each had taken deliberate, affirmative steps to remove the vestiges of state-imposed segregation existing prior to 1954, created by Kentucky law.

The District Court concluded, and we submit properly, that the existence of some schools within the two districts which were not racially balanced according to the composition of the racial population of the community were not the result of factors which could be controlled by the school authorities.

This Court, in its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), stated:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentration in some schools." 402 U. S. 1, 23.

This Court recognized that despite all efforts, no matter how well intended by school authorities, and even when those authorities actively and positively engaged in attempting to dismantle a dual system, that:

> "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. *One vehicle can carry only a limited amount of baggage.*" 402 U. S. 1 at 22 (Emphasis ours).

The District Court found facts from which it is reasonable and proper to conclude that neither the Jefferson County school board nor the Louisville school board had adopted a "racially neutral" plan of assigning

children. They had not employed methods which were racially neutral in operation. Respondents in the District Court had advocated a "simple expedient" which was to transport large numbers of white children from their homes to schools which were predominantly black while at the same time transporting black children out of their neighborhood schools into distant areas in order to distribute them in schools containing large numbers of white children. Such a procedure may indeed be necessary where segregation of children denies them equal opportunities and is the result of deliberate and invidious racial segregation, but the Court of Appeals itself had determined in *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966) and *Deal* v. *Cincinnati Board of Education,* 419 F. 2d 1387 (6th Cir. 1969), twice reviewed by the Supreme Court of the United States, that:

> "We hold that there is no constitutional duty on the part of the board to bus Negro or white children out of their neighborhoods or to transfer classes for the *sole purpose of alleviating racial imbalance that it did not cause.*" (Emphasis ours.)

The decision of the Court of Appeals in this case conflicts with the decisions of this Court because, as we shall demonstrate, the Court of Appeals consistently has equated the existence of "racially identifiable schools" with unconstitutionality and imposed on the school boards an affirmative responsibility to see that no other school *would ever become* "racially identifiable". This holding is erroneously predicated upon

the assumption that some particular degree of racial balance is commanded by the Constitution.

A fair reading and interpretation of the Court of Appeals' decision compels the conclusion that that Court equated racial balance with constitutionality, and conversely, concluded that the presence of "racially identifiable" schools within a school system which had previously been a dual school system, constitutes *in and of itself a denial of* equal protection of the law. The Court of Appeals has in reality decreed that the existence of one virtually all-black school among 74 elementary schools, surrounded by black residential population, when coupled with the fact that 56% of all the black elementary schools in the entire system attend this school and two others, creates an unconstitutional condition where adjacent schools have an increasing black population. By basing its finding that the Jefferson County school board operated a dual school system upon statistical "imbalance" found in three elementary schools, the Court of Appeals, in effect, has determined that a school system with a history of de jure segregation cannot maintain neighborhood elementary schools where the system experiences a high concentration of minority residents in one or two neighborhoods. Such a holding is based upon the erroneous equation of the concept of the unconstitutionality of "racially identifiable" schools with the perceived constitutional command that respondents have a substantive right to require that every school in the school system, or as here, the entire metropolitan area, reflect the racial composition of the student population of the entire community.

This Court has never adopted such a constitutional standard. *Milliken* v. *Bradley, supra.*

With reference to the Jefferson County school district, the Court of Appeals appears to ignore the teaching of the *Swann* decision that dismantling a dual school system does *not* require any particular racial balance in each school and that "some small number of one-race or virtually one-race schools within a district is not in and of itself a mark of a system that still practices segregation by law". Nor, is this the first time the Sixth Circuit Court of Appeals has so erroneously concluded. The majority opinion of the Chief Justice in *Milliken* v. *Bradley* contains statements which are critical of the opinion of the Court of Appeals for proceeding on the assumption that the Detroit schools could not be truly segregated unless the racial composition of the student body of each school substantially reflected the racial composition of the metropolitan area as a whole. The particular quotation to which we have reference is as follows:

> "Viewing the record as a whole, it seems clear that the district court *and the court of appeals* shifted the primary focus from a Detroit remedy to the metropolitan area *only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable.* Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—*in their view of what constituted desegregation*—unless the racial composition of the student body of each school substantially reflected the racial

> composition of the population of the metropolitan area as a whole." *Milliken* v. *Bradley*, —— U. S. —— (1974) 94 S. Ct. 3112, p. 3125.

The Appellate Court chose to ignore, or at least discount entirely, the conclusion of the District Judge, based upon the undisputed evidence that the Jefferson County Board for a number of years had consistently engaged in an effort to integrate the children in the solidly black Newburg community by assigning a number of the school children from that community to adjacent schools with a predominantly white pupil population. The fact that the school board had erected two middle schools in the area for the purpose of reducing the number of black students at Newburg and thus contributing to the desegregation of the school system as a whole was apparently overlooked. The Court of Appeals was required to look ten miles across the county to unrelated Cane Run school to find the statistical support for its conclusion that 56% of the black children in the entire system attended three schools. The District Court found, and the evidence was undisputed, that there is no relationship between the Price-Newburg area problem and the Cane Run school attendance zone problem and the rebuilding of that school. Indeed, the Court of Appeals conceded that the situation at Cane Run might not compel a conclusion that the board fostered segregation.

Necessarily, in a school system with a white pupil population of 96% (a condition created by housing patterns, urban renewal and industry location, and not by any design or activity of the Jefferson County school

board), where the black population is highly concentrated in two residential areas, it is not strange that several virtually all-white schools may be found in the system and one nearly all-black school.

In fairness to the Court of Appeals, its opinion does not at any place make the dogmatic statement that racial balance by a strict mathematical formula is required, nor does the opinion, in dealing with the remedies which it required the District Court to incorporate in a desegregation plan, designate exactly any specific remedy. But because the Court of Appeals has required racial balance by equating constitutionality and racial balance or conversely, by declaring "racially identifiable" schools vestiges of state imposed segregation, it has by direct and positive implication required "racial balance" which in the particular demographical situation can be accomplished only by *massive transportation* of children considerable distances. This is the only remedy that can transform what the Court of Appeals has perceived as "racially identifiable" schools into "racially balanced" schools. All the other court sanctioned tools, clustering, paring, majority to minority transfer, magnet schools, the whole gamut, cannot overcome shifting housing and socio-economic patterns of the magnitude experienced in Jefferson County, Kentucky, in the decade 1965-1975. It is not alone "white flight" but also "black movement and concentration" which confronts the school authorities. *Demographic stability in a mobile society is more baggage than the school vehicle can carry.*

In dealing with the Louisville Independent district, the Court of Appeals determined that all of the

efforts of that school board in the relocation of schools, the assignment of pupils and its geographical transfer plan did not meet the constitutional requirements of affirmative action on the part of that board because of the resulting racial imbalance, to wit, racial identifiability of a number of the schools. The evidence was undisputed that about 51 percent of the student population of the district is black. The demographic data relative to attendance zones reflected that the school population generally reflected the neighborhood population. During the 20-year period following *Brown,* a tremendous movement of the population caused varying racial percentages in the schools. The changing student population corresponded with the changing racial housing pattern caused primarily by white exodus from the west end of the City of Louisville. The Louisville student assignment plan described as a "geographic zone plan with provisions for a transfer" was not a warmed-over version of the northern system of "open enrollment" or what southerners have called "freedom of choice", nor is it a neighborhood school plan in its entirety. The district court found that zones were established to meet the needs of the surrounding community area as the needs related to the capacity of the schools; that there was not the slightest evidence that the board's student assignment plan or the establishment of school attendance zones had contributed to racial imbalance that existed in some of the Louisville schools. Changes that were made in the attendance zones from time to time, the Court found, were directed toward better racial balance.

The second opinion of the Court of Appeals in December, 1974, while directed to the issue of inter-district remedy, reveals plainly the complete lack of understanding by that Court of the factual situation in Jefferson County, Kentucky, in at least two major respects. Atherton High School, which the Court of Appeals described as being located in the county and away from the core city of Louisville, indicating a disregard for school district lines and creating racial imbalance in the schools, in truth and in fact, as is well known to every person in the community as well as the District Judge, has no relation whatsoever to racial composition of the school and indeed, as found by the District Court, has more black students in it in its present location than it did in its previous location in the core area. The Court of Appeals also concluded that because the Louisville school district boundaries were not contemporaneous with the boundaries of the city of Louisville, about 10,000 white children who actually reside within the city are required to attend schools in the county which materially aggravates the difficulties in disestablishing the dual city school system. Nothing could be further from the truth. While the fact may have some relevance to legal issue of school district lines, there is not one scintilla of evidence in the record that the school district lines were drawn or maintained because of any connection with the racial composition of the schools contained in the area. The sole cause was the annexation fever of the 1950's.

We recognize the fact that in the *Milliken* opinion this Court was considering the question of inter-dis-

trict remedy and the equitable powers of the district court and was not concerned with whether or not the metropolitan Detroit schools were in constitutional violation. The concurring opinion of Mr. Justice Stewart specifically points out that "the majority opinion does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." *Milliken* v. *Bradley,* 94 S. Ct. 3112 at page 3131.

We believe, however, that two footnotes to the Chief Justice's majority opinion are vitally important in a consideration of the matter here presented as to whether or not the two districts in Jefferson County are in constitutional violation. We refer, of course, to footnote 19 of the majority opinion, 94 S. Ct. 3112, at page 3125, and footnote 22 of that majority opinion found at 94 S. Ct. 3112 at p. 3128. These two footnotes are set out here and we have italicized those portions which we think are critically important to the determination of the issue herein. They are:

> "Disparity in the racial composition of pupils within a single district may well constitute a 'signal' to a district court as the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. In *Swann,* for example, we were dealing with a large but single, independent school system and a unanimous Court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of

> one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory.' Id., p. 26. See also *Keyes, supra,* 413 U. S. at 208. *However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates* simply to shift the burden of proof, is a very *different matter than equating racial imbalance with a constitutional* violation calling for a remedy. (Keyes, supra, also involved a remedial order within a single autonomous school district." 42 U.S.L.W. 5249, p. 5256, F.N. 19. (Emphasis added.)

The opinion of the Sixth Circuit Court of Appeals which we are in reality seeking to review here is the opinion written before this Court's decision in *Milliken* v. *Bradley* on July 25, 1974. We believe it suffers from the same defects that the Chief Justice criticized in the Court of Appeals' opinion in *Milliken* v. *Bradley* —an erroneous view that a particular racial makeup of the school district's population brands that district as being in constitutional violation regardless of the efforts of the school authorities. Footnote 22 of the Chief Justice's opinion in *Milliken,* we think, supports our view.

> "The suggestion in the dissent of Mr. Justice Marshall that schools which have a majority of Negro students are not 'desegregated', whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases. In *Green* v. *County School Board of New Kent County,* 391 U. S. 403 (1958), for

example, the Court approved a desegregation plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% white. In *Wright* v. *Council of the City of Emporia,* 407 U. S. 451 (1972), the optimal desegregation plan would have resulted in the schools being 66% Negro and 34% white, substantially the same percentages as could be obtained under one of the plans involved in the case. And in the *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484, n. 5 (1972), a desegregation plan was implicity approved for a school district which had a racial composition of 77% Negro and 22% white. *In none of these cases was it even intimated that 'actual desegregation' could not be accomplished as long as the number of Negro students was greater than the number of white students."* 49 U.S.L.W. 5249, 5258, F.N. 22. (Emphasis added.)

CONCLUSION

The Circuit Court of Appeals has imposed as a condition of constitutional validity an unspecified degree of racial balance and, contrary to the opinions of this Court, has equated the existence of "racially identifiable" schools with unconstitutionality. The District Judge found that the two school boards had moved with dispatch and diligence following *Brown* I to integrate the schools and faculty and that they had succeeded (App. 35). Since 1965 the District Court found regrettable racial imbalance proliferating, in spite of resistance by the boards, due to neighborhood housing patterns and socio-economic factors, not de jure acts or failure to act. The Court of Appeals either ignored this finding or disagreed with the conclusion and found that the boards had defaulted in their duty. This conclusion ignores this Court's determination in *Swann, supra,* that school authorities are not constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished.

The Constitution, as interpreted by this Court, requires that school authorities exclude no pupil of a racial minority from any school directly or indirectly on account of his race. Respondents conceded at the outset that the schools of the Jefferson County system are not racially identifiable because of poor quality or substandard education. They claim the schools are racially identifiable because they are not racially balanced. This Court has not construed the Constitu-

tion to require that every school in a system with a history of de jure segregation reflect the racial composition of the metropolitan area within which the school system is located.

The 1974 decision of the Court of Appeals presents issues of imperative public importance and conflicts in principle with decisions of this Court as set forth herein.

We respectfully submit that a writ of certiorari be granted to review that judgment.

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